In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-310

PACIFIC GAS TRANSMISSION COMPANY,
PACIFIC GAS AND ELECTRIC COMPANY,
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
SOUTHERN CALIFORNIA GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

DANIEL E. GIBSON
JACK W. SHUCK
245 Market Street
San Francisco, California 94105
Attorneys for Pacific Gas Transmission Company

MALCOLM H. FURBUSH
HOWARD V. GOLUB
77 Beale Street
San Francisco, California 94106
Attorneys for Pacific Gas and Electric Company

RAYMOND N. SHIBLEY
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Bank of America National Trust and Savings Association

K. R. EDSALL
E. R. ISLAND
P. O. Box 54790, Terminal Annex
Los Angeles, California 90054
Attorneys for Southern California Gas Company

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

TABLE OF AUTHORITIES

In the Supreme Court of the United States

October Term, 1976

No. .....

Pacific Gas Transmission Company,
Pacific Gas and Electric Company,
Bank of America National Trust and Savings Association,
Southern California Gas Company,
Petitioners,

v.

Federal Power Commission,
Respondent.

Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petitioners Pacific Gas Transmission Company, Pacific Gas and Electric Company, Bank of America National Trust and Savings Association, and Southern California Gas Company jointly petition for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 9, 1976.

OPINIONS BELOW

In a two-to-one decision written by Justice Clark (Chief Judge Bazelon dissenting) the United States Court of Appeals for the District of Columbia Circuit affirmed a Federal Power Commission decision which, by arbitrarily revoking a previously approved natural gas pipeline tariff, has undermined the pipeline's financial integrity and crippled the entire industry's efforts to finance the large new gas supply ventures so vital to the solution to our Nation's looming energy shortage. The majority and dissenting opinions of the Court of Appeals, *Pacific Gas Transmission Company v. Federal Power Commission* (and the amendment thereto), not yet reported, appear as Appendix A attached hereto. The order of the Federal Power Commission (Commission) issued September 3, 1974 and the Commission order issued November 1, 1974 modifying prior order and denying rehearing, reported at 52 FPC 620 and 52 FPC 1188, respectively, appear as Appendices D and E, respectively, attached hereto. The Initial Decision of the Administrative Law Judge appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1976. The Joint Petition for Rehearing by Pacific Gas Transmission Company (PGT) and Pacific Gas and Electric Company (PGandE), intervenor, in the Court of Appeals proceeding, was denied by order dated June 2, 1976 (Appendix B); this Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (Appendix H). The case presents an important and novel question under the Natural Gas Act which has not been, but should be, settled

by this Court to assure the timely and economic development of supplemental gas supplies to help meet this Nation's energy needs.

QUESTION PRESENTED

After the Federal Power Commission has initially authorized a natural gas pipeline project wholly dependent upon the importation of natural gas from Canada and has induced investment in such a project by approving a sales tariff which guarantees timely recovery of costs, is it legally permissible under the Natural Gas Act for the Commission to revoke that guarantee in reaction to increasing natural gas export prices resulting from Canadian Government decisions over which the pipeline has no influence?

STATUTES INVOLVED

Statutory provisions germane to the decision of this case are Sections 3 and 5 of the Natural Gas Act, 15 U.S.C. 717b and 717d. These statutory provisions are set forth in full as Appendices F and G, respectively.

STATEMENT OF THE CASE

In a proceeding under Section 5 of the Natural Gas Act, the Commission here ordered changed a natural gas pipeline company's previously approved tariff so as to revoke the tariff's guarantee that the company would timely recover unavoidable increases in the costs of purchasing natural gas from Canada. The Commission action was not based upon any finding of imprudence or misconduct by the pipeline, but instead was a reaction to impending orders of the Canadian Government raising substantially the price of gas exported from Canada. The uncontradicted evidence showed that the pipeline's sales tariff had

operated justly and reasonably for its entire thirteen year history, and that investors had been induced to finance the pipeline on the strength of that tariff.

The pipeline's pre-existing "cost-of-service" tariff is the basic tariff form being considered for use in connection with virtually all of the massive supplemental gas supply projects which are being proposed to help to alleviate this Nation's energy shortage, including, most notably, the various proposals to transport the vast reserves of the Alaskan North Slope to gas-hungry markets in the lower forty-eight states. The guarantee of timely cost recovery provided by a cost-of-service tariff is strongly urged by many financial experts as being absolutely necessary in order to attract the huge amounts of private capital required for the construction of these projects of unprecedented size and risk. The Commission's action here, affirmed by a sharply divided Court of Appeals, has created grave uncertainty whether the "cost-of-service" tariff form can be relied upon to support the financing of new and critically needed large-scale gas supply ventures if it can be revoked by such arbitrary action as occurred in this case. The urgent national interest in the prompt development of energy supplies makes it absolutely imperative that this uncertainty and confusion be immediately dispelled by a decision of this Court on the fundamental issue posed by this case.

A. The Joint Petitioners.

PGT is a natural gas pipeline company subject to the jurisdiction of the Commission. PGT owns and operates a 36-inch natural gas pipeline which extends from the International Boundary between Canada and the United States to the Oregon-California border. PGT's sole source of gas supply is Canada, and the gas it imports constitutes ap-

proximately 35% of the total volume of gas entering the U.S. from Canada. PGT is a partly owned subsidiary of PGandE and sells all of the natural gas it purchases to its one customer, PGandE, at the Oregon-California border. In 1974 the gas purchased by PGT provided approximately 40 percent of the natural gas supplied to consumers in northern and central California; in 1976, the percentage is projected to increase to 45 percent.

Petitioner PGandE is a regulated public utility which is responsible for providing electric and gas service over large portions of northern and central California. Its service area includes the San Francisco Bay region and most of the large metropolitan areas of California's central valley, encompassing a population of 8.6 million people. Approximately 2.4 million gas customers are dependent upon PGandE for continued adequate and reliable gas service. In addition, approximately 2.9 million customers look to PGandE for their supplies of electricity, and PGandE uses some albeit steadily decreasing amounts of natural gas to generate part of this electricity. In order to protect the continued flow of Canadian natural gas upon which PGandE and its consumers are so heavily reliant, PGandE intervened in this proceeding and participated actively before the Commission and before the Court of Appeals.

Petitioner Bank of America National Trust and Savings Association (Bank of America) is the Trustee under an Indenture of Mortgage and Deed of Trust dated as of January 1, 1961 authorizing PGT to issue up to $90 million principal amount of First Mortgage Pipe Line Bonds. PGT's extensive pipeline system was financed and constructed and later expanded on the strength of this arrangement. Since any action exposing PGT to delay or denial of recoupment of the vast sums it must spend for

purchased gas would inflict severe harm on the bondholders, Bank of America intervened in the administrative proceeding and in the court review below and sponsored an expert financial witness whose uncontradicted testimony thoroughly articulated the many adverse consequences likely to flow from modification of PGT's cost-of-service tariff.

Petitioner Southern California Gas Company (SoCal) is a distributor of natural gas serving approximately 3.3 million customers in the central and southern portions of the State of California. Its service area covers a population of approximately 10.8 million. Although SoCal has no corporate interest in PGT nor does it receive any natural gas imported by PGT from Canada, one of its affiliated companies proposes to use an expanded PGT system for the transportation of Alaskan North Slope gas to the SoCal market. As a distributor involved in several projects whose economic viability is dependent in part upon appropriate action being taken by the Federal Power Commission, SoCal is vitally interested in the impact of the decision below on the ability of regulated natural gas companies to finance large, new vitally needed gas supply projects; SoCal is gravely concerned that the action taken by the Commission in this proceeding will be a serious impediment to the development of such projects. For these reasons, SoCal participated in the proceedings below both at the Commission and Court of Appeals levels.

B. The Operative Facts and Proceedings Below.

PGT's sale of gas to PGandE is made under a "cost-of-service" tariff which results in a varying charge from month to month to reflect increases and decreases in costs —including purchased gas costs—as they are experienced. PGT's cost-of-service tariff has been in effect since 1961,

having been approved by the Commission when it originally authorized the Alberta-California Pipeline Project. By the terms of its certificates of public convenience and necessity, PGT is authorized to purchase its entire gas supply from its Canadian supplier at the prices established pursuant to Canadian governmental authority. PGT has no other source of gas supply.

Because the contractual rate for purchases of gas from Canadian producers is less than the "value" of the gas, the Government of Canada has prescribed regulations prohibiting the export of gas to United States pipelines such as PGT unless the price paid at the border is raised to the value level prescribed by Canadian governmental orders. In an investigation instituted under Section 5 of the Natural Gas Act, the Commission expressed its concern over the announced intent of Canadian governmental authorities to order these substantial increases in the border price charged to PGT and other United States importers of Canadian gas and directed that the proceeding investigate the reflection of such price increases in PGT's charges to its customer.

A hearing was held and concluded on April 30, 1974. On July 1, 1974 the Administrative Law Judge issued his Initial Decision Ordering Modification of Cost of Service Tariff in which he concluded that although "PGT's cost of service tariff was reasonable when authorized and has operated reasonably since," that tariff should now be changed to require PGT to obtain prior Commission approval to increase its charges each time it experiences an increase in costs due to gas price raises mandated by the Canadian Government. In support of his conclusion, the Administrative Law Judge lamely explained that the "Commission must be free to deal" with Canadian price

increases, while he acknowledged that there was nothing in the record which showed that action by the Commission could affect such increases. However, according to the Administrative Law Judge, "the unchallenged testimony" *did* show:

> "the reasonably anticipated results of requiring PGT to obtain prior Commission approval for rate changes:
>
> "1. PGT would need more cash than at present to tide it over the periods of administrative lag.
>
> "2. Lower bond ratings and higher interest costs for PGT.
>
> "3. Higher prices to be charged by PGT and PG&E.
>
> "4. The risk of financial loss even to the point of bankruptcy." (Appendix C, pp. 26-27.)

On September 3, 1974, the Commission issued an order in which it adopted the Initial Decision without explaining what public purpose could be served by the "prior review" provision which could outweigh the certain jeopardy to consumer interests and PGT's financial integrity.

By further order dated November 1, 1974 the Commission modified its order of September 3, 1974 to make its "prior review" provision conform with the requirements of Section 4 of the Natural Gas Act, but denied rehearing in all other respects.

On November 22, 1974 PGT petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission orders under the jurisdiction conferred on that court by Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). On April 9, 1976 a divided panel of that court affirmed the Commission orders. The panel, similarly divided, considered but denied a petition for rehearing by order dated June 2, 1976.

REASONS FOR GRANTING THE PETITION

Natural gas is a commodity whose continued supply is vital to the Nation's welfare. Gas supplies one-third of all of the energy used in this Nation's economy, and is an important raw material for numerous products from fertilizers to plastics. In recent years, however, the volume of new gas supplies brought to market by the Nation's pipelines has failed to satisfy demands and a serious and growing shortage now looms large.[1] Natural gas pipelines are being forced to search ever farther afield to find supplies supplementary to existing sources. The search has extended to the far frontiers of the Arctic, and across the oceans. New technologies involving liquified natural gas (LNG) and novel coal gasification processes are being utilized, and transportation distances are becoming greater and greater. Yet the challenge facing the natural gas pipeline industry must be met if this Nation is to have an adequate supply of energy.

The costs of these new supplemental supply projects are prodigious, on a scale far beyond that ever experienced by the industry. A severe strain is being placed upon industry's ability to attract the quantities of private capital necessary to do the job.[2] As the scale is great so are the risks, and methods of reducing investment risk must be employed if capital is to be attracted. The cost-of-service tariff form like that used by PGT is one device which provides some assurance to investors that their substantial

---

1. During the six years previous to 1975 in the lower 48 states about two and one-quarter times as much gas has been produced and used up as has been found. Federal Power Commission, *Natural Gas Survey*, 1975, Vol. 1, p. 1.

2. "There is little question that financing is one of the major problems facing the gas industry as well as all public utilities today." *Natural Gas Survey*, 1975, Vol. 1, p. 5.

investments in new energy ventures will not be eroded by regulatory delays. As an investment banker testified in this proceeding:

> ". . . the central characteristic of these projects is the rather mind-boggling amount of capital which must be invested before the first dollar of revenue can be earned. These projects are so costly that individual companies do not have a sufficiently large equity capital base to undertake these financings, unless protected by a full cost of service recovery formulae, without destroying the credit of their outstanding securities or destroying their ability to finance the growth of their traditional business." (Joint Appendix, p. 90)

However, for cost-of-service protection to be meaningful, it must be known that the guarantee of a cost-of-service tariff cannot be arbitrarily revoked after investment has been made on the strength of that guarantee. Thus, the critical importance of this case, for here the Commission arbitrarily and abruptly changed the rules in the middle of the game. The Commission's revocation of cost-of-service treatment for unavoidable, externally imposed, purchased gas costs poses an issue that is vital to the industry and to the Nation and should be settled by this Court. If the Commission can legally withdraw a guarantee of cost recovery for costs which are so clearly vital to the continuation of a company's business, what then is the value of the cost-of-service guarantee?

The majority opinion of the court below concluded that:

> ". . . the substantive question here is a simple one and may be stated in simple terms: 'Does the Commission have the power under Section 5(a), and in accordance with the Natural Gas Act, to require that, before increasing its wholesale rate, PGT file an application and seek approval of the increase under the provision

> of Section 4 of the Act?' We find that it does." (Appendix A, p. 4.)

With all due respect, while that question may be a simple one, it was not the real question in contention here. No one challenged the Commission's authority under Section 5 to investigate the tariffs, rates and charges of natural gas companies and, *when supported by rational findings and substantial evidence,* to order appropriate modifications in such tariffs, rates or charges.

Nor does this case raise the issue whether the Commission has authority to examine the public interest in continuing the importation of natural gas from Canada. The Commission's authority to address itself directly to the issues raised by importation is clear on the face of Section 3 of the Act; although the Commission has exercised that authority in other cases,[3] it did not choose to do so here. Instead, the Commission proceeded under Section 5 of the Act, and thereby precluded itself from

---

3. As Chief Judge Bazelon pointed out in his dissent below: "The real measure the Commission wishes to be able to consider with respect to Canadian price increases, as its opinion makes clear, is a halt in further importation of Canadian gas. . . . But that measure can be taken, if at all, only in a proceeding under section 3 of the Natural Gas Act, 15 U.S.C. § 717b, which provides for issuance and amendment of authorizations to import foreign gas. If the Commission desired to assure itself an opportunity to consider halting imports in light of each price increase, it should have proceeded under section 3 to amend PGT's import authorization to require further review and a new authorization for each future price increase before PGT could import gas at the higher price. This is precisely what the Commission did in *Midwestern Gas Transmission Co.,* a decision on which the Commission purported to rely here. . . . Instead, the Commission acted under section 5, 15 U.S.C. § 717d(a), to amend the tariff so as to require review under section 4, 15 U.S.C. § 717c, before PGT can recover costs incurred in acquiring gas PGT was authorized—indeed obligated—to acquire." (Footnotes omitted.) (Appendix A. pp. 11-12.)

directly confronting the issue with which it was so clearly concerned—the public interest in continued importation of Canadian natural gas at higher prices. The Section 5 investigation could consider only the reasonableness *vel non* of the mechanics for reflecting those costs in charges to PGT's customer.

The Commission's exercise of authority under Section 5 must be

> "a two-step adjudicatory process: first, the Commission must find that an existing condition is unjust or discriminatory; second, the Commission must prescribe the remedy for that condition. Each step requires the Commission to draw a legal conclusion, *viz:* the illegality of an existing condition and the justness and reasonableness of the remedy." (*American Smelting & Refining Company v. FPC,* 494 F.2d 925, 940-941 (D.C. Cir. 1974).)

The Commission found that PGT's existing tariff, which it admitted had operated in a just and reasonable manner during its entire thirteen years of effectiveness, suddenly became "unreasonable" simply because of the pendency of Canadian mandated increases in the price that PGT must pay for its sole supply of natural gas. Yet, neither the Commission nor the court below offer any rational explanation why a tariff which merely allows the pipeline company to pass on costs which it *must* incur and over which it has *no* control can be unjust and unreasonable. Furthermore, neither the Commission nor the court below offer any explanation how the tariff modification can be just and reasonable when, as concluded by the Administrative Law Judge and the Commission itself, it will increase the price of gas to the pipeline's customer and the ultimate consumers and undermine the pipeline's financial integrity-with no conceivable advantage to anyone.

While the Commission may have been attempting to "send a message to Ottawa" indicating displeasure with the price increases, the opinion of the Administrative Law Judge specifically noted the absence of any showing that the Commission's action would influence Canadian gas prices (Appendix C, p. 25-26). Commission review of Canadian gas price increases and denial of authorization to PGT to pass on the increased cost can only result in severe financial jeopardy for PGT and, ultimately, the cessation of its ability to deliver natural gas to California. Surely the Commission does not propose that it is rational to curtail the importation of Canadian gas by bankrupting an American company which purchases it!

Especially in the light of the guarantee of timely cost recovery upon which investors were originally induced to commit funds to PGT, the imposition of uncertainty as to PGT's ability to recover unavoidably incurred costs is unjust and unreasonable. The Commission has ardently urged the need for it to have the right to deny PGT recovery of increased costs incurred as a result of Canadian gas price increases. Presumably, the Commission would not, pointlessly, subject PGT to adverse financial consequences and California consumers to higher prices if it did not contemplate exercising the right to deny PGT recovery of increased gas costs. Under a cost-of-service tariff, since all cost savings as well as cost increases are passed on to the consumer, the failure to recover any particular item of cost means that the return on invested capital is immediately and irreparably reduced below the level specified as reasonable by the Commission itself. This is clearly illegal, for it is elementary that a public utility is constitutionally entitled to earn a fair return on invested capital.

FPC v. Hope Natural Gas Company, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Company v. Public Service Comm.,* 262 U.S. 679 (1923).

While PGT is authorized and required to continue importing and selling natural gas, it is surely beyond doubt that the cost it *must* incur to obtain that gas is a necessary and prudent cost of operation. Likewise, there can be no question that a pipeline is entitled to recover in rates all prudently incurred costs of providing service.

> "This is so because under the due process clause of the Constitution *no public utility could be compelled to absorb its own costs and not pass them on to the consumer.*" (*Public Service Commission for the State of New York v. FPC,* 467 F.2d 361, 370 (D.C. Cir. 1972).) (Emphasis added.)

How, then, could the Commission rationally expect to exercise the prior review power which it has engrafted onto the PGT cost-of-service tariff? The Commission provided no explanation despite this Court's admonition that an administrative agency, such as the FPC, is

> "bound to exercise its discretion within the limits of the standards expressed by the Act; and 'for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it."' *Burlington Truck Lines v. U.S.,* 371 U.S. 156, 167-168 (1962), quoting in part from *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941)." (*FPC v. Texaco,* 417 U.S. 380, 396 (1973).)

In this case, as dissenting Chief Judge Bazelon mildly observes:

> "The Commission has failed to explain why imposing a prohibition on cost recovery ever would be an appropriate or even plausible response to Canadian price

increases. After all, PGT, not the Canadian government or Canadian producers, would bear the brunt of such a prohibition; the FPC concedes that had PGT been required to absorb even the initial 32 cent price increase for a short period of time it would have been driven out of business, and 2,000,000 consumers would have been deprived of 40% of their gas supply. Yet PGT plainly has no responsibility for or control over price increases mandated by the national Canadian government. PGT cannot even mitigate the impact of those increases by expanding production on non-Canadian gas since PGT's sole [source of supply is] Canada. Thus, the Commission could not possibly question the reasonableness of PGT recovering costs imposed upon it by the Canadian government. This would be true even if those costs were unreasonable—a question the Commission expressly declined to consider." (Dissenting Opinion, Appendix A, p. 11.)

The evidentiary record of the case belies the assertion that no harm is done if the Commission never chooses to deny PGT the right to recover increased gas costs. Immediate and unjust consequences inure to the detriment of the pipeline, its investors, and consumers of natural gas whether or not the Commission ever exercises its newly claimed authority. The plain fact is that the Commission has fashioned for itself the arbitrary power to bankrupt PGT.

The bald assertion of a new authority to deny a pipeline company the right to recover prudently incurred costs, even to the point of bankruptcy, would be alarming by itself. Here it is cause for the gravest concern where the Commission, acting on facts beyond the company's control, revoked a well-established tariff guarantee of timely cost recovery upon which investors relied in initially committing

funds to the company. The assertion of this arbitrary power to send a company and its investors into financial ruin regardless of the prudence of the company's own conduct has sent shock waves through the natural gas industry. The concern of the investment community over the implications of the Commission's action was voiced by Bank of America's witness, an executive of an investment banking and securities firm, who stated that revocation of cost-of-service treatment for PGT's gas purchase costs

> ". . . will represent a new threat that Federal Power Commission authorizations on the strength of which immense investments are customarily made, must henceforth be evaluated as being subject to subsequent regulatory action withdrawing the protection after the investment has been put in place. This is an entirely new and frankly, quite frightening development." (Joint Appendix, p. 89)

The Commission's decision as affirmed by the court below has made this frightening prospect a reality. These actions dim the hope that vitally needed large new supplemental gas supply projects can be privately financed. For that reason alone, it is respectfully submitted that this Court should grant the writ and make it clear that the Commission's arbitrary action here, detrimental to investors and consumers alike, has no warrant under the Natural Gas Act.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submited,

DANIEL E. GIBSON
JACK W. SHUCK

Attorneys for Pacific Gas Transmission Company

MALCOLM H. FURBUSH
HOWARD V. GOLUB

Attorneys for Pacific Gas and Electric Company

RAYMOND N. SHIBLEY

Attorney for Bank of America National Trust and Savings Association

K. R. EDSALL
E. R. ISLAND

Attorneys for Southern California Gas Company

Appendix A

United States Court of Appeals
For the District of Columbia Circuit

No. 74-2046

PACIFIC GAS TRANSMISSION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
PACIFIC GAS AND ELECTRIC COMPANY
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOC.
SOUTHERN CALIFORNIA GAS COMPANY, INTERVENORS

Petition for Review of an Order of the
Federal Power Commission

Argued December 15, 1975

Decided April 9, 1976

Sanford M. Skaggs, with whom *Peter W. Hanschen,* was on the brief for petitioner.

Philip R. Telleen, Attorney, Federal Power Commission for respondent. *Drexel D. Journey,* General Counsel, Federal Power Commission, *Robert W. Perdue,* Deputy Gen-

eral Counsel, *Allan Abbot Tuttle,* Solicitor and *William D. Braun,* Attorney, Federal Power Commission, were on the brief for respondent.

Raymond N. Shibley, with whom *Brian D. O'Neill* was on the brief for intervenor Bank of America National Trust and Savings Association.

Malcolm H. Furbush, Daniel E. Gibson and *Howard V. Golub,* were on the brief for intervenor Pacific Gas and Electric Company.

K. R. Edsall and *E. R. Island* were on the brief for intervenor Southern California Gas Company.

Before: BAZELON, *Chief Judge,* CLARK,* *Associate Justice* of the Supreme Court of the United States, and MACKINNON, *Circuit Judge.*

Opinion for the Court filed by *Mr. Justice* CLARK.

Dissenting opinion filed by *Chief Judge* BAZELON.

Mr. Justice CLARK: The petitioner, Pacific Gas Transmission Company (PGT) is engaged in the transportation of natural gas from production fields in the Province of Alberta, Canada, to communities in Northern and Central California, pursuant to orders and certificates of the Federal Power Commission (Commission). PGT sells its gas to its parent company, the Pacific Gas and Electric Company (P, G and E), in accordance with a tariff approved by the Commission. Prior to the instant decision, that tariff was set on a cost of service basis covering the cost of gas and other operating expenses, depreciation, amortization, taxes, and return on its investment. As a result any fluctuation in its cost of gas was reflected in the monthly billing arrangement between Pacific Gas Transmission and its parent without prior Commission approval.

*Sitting by designation pursuant to 28 U.S.C. § 294(a).

On May 15, 1973, PGT made an informal filing with the Commission of an amendment to a contract it had made with an affiliated supplier, Alberta Southern Gas Company, Ltd. The amendment provided for a one-cent increase per metric cubic foot (Mcf) in the price of gas to PGT to provide a fund for the exploration and development of gas reserves in Canada to be committed for sale to PGT. The Commission initially rejected the informal filing but later rescinded that Order and instituted a Section 5 investigation "to determine whether PGT's cost of service tariff should be modified to limit or redefine the costs which may be reflected as purchased gas costs in PGT's rates." 15 U.S.C. § 717d. The Commission had previously expressed some concern about permitting PGT to pass on as purchased gas costs to P, G and E, and in turn to P, G and E's customers, the exploration and development expenses of Canadian producers without proper guarantee that the resulting benefits would accrue to its U.S. customers. This resulted in the entry of the Order in controversy here after a full hearing before an administrative law judge. The Order requires that prior filings be made with the Commission before any increases in PGT's cost of gas purchased from its Canadian supplier and that resulting increases in cost of service charges be subject to suspension and refund under Section 4 of the Natural Gas Act.

(1) *PGT's Objections: The Question Involved:*

Four basic questions are raised about the Order of the Commission: (1) May the Commission "arbitrarily treat PGT differently than other regulated importers by subjecting PGT alone to indirect regulation?" (2) May the Commission amend PGT's existing tariff "without giving PGT notice of its intended amendment and without pro-

viding PGT an opportunity to be heard?" (3) May the existing tariff be amended "without substantial evidence to support its finding that the existing tariff is unreasonable?" and (4) May the existing tariff be amended "without an express finding, based upon substantial evidence, that the resulting tariff, as amended, is just and reasonable?" The form of the questions is reminiscent of the query: "When did you stop beating your wife?" As we see it, the substantive question here is a simple one and may be stated in simple terms: "Does the Commission have the power under Section 5(a), and in accordance with the Natural Gas Act, to require that, before increasing its wholesale rate, PGT file an application and seek approval of the increase under the provision of Section 4 of the Act?" We find that it does.

(2) *The Background:*

Since PGT asserts arbitrary action on the part of the Commission without notice as well as without substantial evidence, we believe it necessary to fill in the bare bones direction of the pre-order procedure heretofore given us. PGT provoked the action of May 15, 1973 by directing to the Commission its letter notice of an amendment that had been made to PGT's gas purchasing contract with its affiliate, Alberta and Southern Gas Company, Ltd. The Commission then instituted a Section 5(a) proceeding, and on April 30, 1974, a public hearing was held before an Administrative Law Judge. After hearing testimony, receiving briefs, and hearing oral argument, he issued his initial opinion dated July 1, 1974. Among other things, he found that the Canadian border price of gas to PGT was scheduled to increase from 38 to 70 cents per Mcf on July 1, 1974, and that prior stability in the border price was

jeopardized through the planned adoption of a new formula for determining the border price, *i.e.* by reference to prices for competing alternative energy sources in the markets served by Canadian gas.[1]

The Administrative Law Judge found this situation to be a "change of considerable significance and unquestionable certainty in the ground rules" under which the tariff had originally been approved. See *Pacific Gas Transmission Co.*, 24 FPC 134 (1960). He therefore concluded that the "heretofore reasonable tariff, which operated reasonably in the past, has become unreasonable in that it permits price increases, however massive and however unrelated to cost, to be reflected in the cost of service without prior Commission approval." We find that time has certainly proven his prediction to be true.[2] He concluded that these consequences far outweighted the adverse effect that prior Commission approval might have on PGT and that the Commission must devise procedures that will enable it to promptly decide in advance the increases to be allowed in the price of Canadian gas. The Administrative Law Judge then suggested that PGT's tariff be revised so as to require approval by the Commission of any increases in PGT's

1. The Canadian National Energy Board (NEB) has announced that the export price of gas to the United States should not be materially less than the least cost alternative for energy from indigenous sources. The price of gas for export is subject to review by NEB, which is required to report its findings and recommendations to the Governor-in-Council who then may establish a new minimum price which becomes a condition of the export license.

2. On September 30, 1974, an application to increase PGT rates from 70¢ to $1 per Mcf was made, and on May 13, 1975, this was increased to $1.40. On August 1, 1975, the Commission made effective without suspension a $1.40 per Mcf price, and on November 1, 1975, a $1.60 per Mcf price became operative. Altogether these charges make the present rate over four times what it was on June 30, 1974 (38¢ per Mcf).

cost of gas purchases from its Canadian suppliers, whether imposed or required by Canadian authorities.

The Commission entered such an Order on September 3, 1974; however on suggestion of an Intervenor, Bank of America, on rehearing, the Order as to PGT's tariff was modified on November 1, 1975 to read as follows:

> PGT's tariff be amended by adding, at the end of paragraph 3.1(1) of Rate Schedule PG-1, the following sentence:
>
> Provided, that a prior filing must be made with the Federal Power Commission pursuant to Section 4 of the Natural Gas Act before there is reflected in Seller's cost of service charges any increase in its cost of gas purchased from its Canadian supplier either that is imposed or required by Canadian authorities or that reflects a price for purchased gas higher than the price heretofore reflected in the Canadian supplier's price; the increase in Seller's cost of service charges shall be subject to suspension by the Commission pursuant to said Section 4 and, if so suspended, shall thereafter be collected subject to refund as provided in said Section 4.

(3) *The Commission's Power Under Section 5(a):*

The Commission's order was appropriate. As has been indicated, the initial cost of service tariff of PGT permitted an automatic increase in its rates without prior Commission approval when there was any increase in its cost of gas. The Commission had found that such an automatic method of increase was unjust and unreasonable under the changing conditions above described. Thus it ordered that thereafter tariffs be filed under Section 4 of the Act, 15 U.S.C. § 717c, prior to any higher price being reflected in PGT's tariff to P, G and E for purchased gas. Under the Commission's Section 4 authority, the new higher

price could be suspended by the Commission for five months and thereafter could be collected subject to refund.

We find such an Order clearly within the power of the Commission under Section 5(a) of the Natural Gas Act. As this court said in *American Smelting and Refining Company v. FPC,* 494 F.2d 924, 940-941 (1974), *cert. denied, sub nom. Southern California Gas Company et al. v. FPC,* 419 U.S. 882 (1974), the Commission's authority under Section 5(a) is exercised in:

> a two-step adjudicatory process: first, the Commission must find that an existing condition is unjust or discriminatory; second, the Commission must prescribe the remedy for that condition. Each step requires the Commission to draw a legal conclusion, viz.: the illegality of an existing condition and the justness and reasonableness of the remedy.

Here the Commission concluded that the new competitive fuel criterion by the Canadian authorities, the attempt to add the one-cent per Mcf exploration cost to the price of purchased gas (which was later rescinded), and the impending price increase of July 1, 1974 (from 38¢ to 70¢ per Mcf), with others to follow ($1, $1.40 and $1.60 per Mcf) constituted a radical change of circumstances from the situation in 1960 when the tariff was first approved. In light of newly developed situations these changes made the tariff "unreasonable insofar as it deprived the Commission of authority to decide in advance whether PGT should be permitted to reflect certain types of increased costs in its charges." In short, while the Commission did not find a specific rate unjust or unreasonable or discriminatory, it did find, as it was obliged to do under the existing facts, that the existing tariff so directly controlled the going rate for purchased gas as

to render it unjust and unreasonable in that it permitted any new rate fixed for purchased gas by the Canadian authorities to be passed on automatically to P, G and E and thence to the two million customers of P, G and E in California. Such a practice, if permitted to continue, would be an abdication of the Commission's statutory duty, making it a rubber stamp for Canadian authority, and inevitably subjecting gas consumers to unjust and unreasonable rates fixed by the Canadian authority ipse dixit. This result the Commission could not permit because it would continue a practice that would not protect the millions of customers of P, G and E in California from unjust and unreasonable rates.

After such a finding, the Commission had not only the power but the solemn duty to take immediate action. Moreover, if the existing PGT cost of service tariff were continued, the Commission would be obliged on each occasion of an increase order from Canadian authorities to test the fairness and reasonableness of PGT rates only under Section 5 of the Act, a method which empowers protective rate relief only. Thus the two million California customers would be exposed to unquestionably excessive charges while Section 5 proceedings dragged on and on.[3] The Commission therefore found Section 5 protection inadequate and required that future increases in PGT rates due to increases in the price of Canadian gas be processed through the procedures of the Commission under authority of Section 4 of the Act. Under Section 4, the Commission may suspend an increased rate for up to five months and

3. "• • • the delay incident to determination in § 5 proceedings . . . appears nigh interminable." *Atlantic Refining Company et al. v. Public Service Commission of New York*, 360 U.S. 378, 389 (1959).

thereafter require a refund of amounts collected in excess of the rates eventually determined to be just and reasonable.

The parade of horribles that PGT suggests will lead to its destruction as a result of such an Order are hardly tenable. Witness the 100 percent increase that it received under Section 4 procedures on August 1, 1975, less than three months after its application was filed. Thereafter, on November 1, 1975, with the ink hardly dry on the first authorization, it received another one of approximately 15 percent. The Federal Power Commission is not known for its niggardliness. In any event, as the Commission found, it cannot abdicate where the public interest is so deeply involved; both here and now that interest requires the complete bond of protection afforded by Section 4. Should conditions change, it will be soon enough to pursue other remedies.

Nor do we find any merit whatever in PGT's contention that the Commission does not have the power to modify the PGT cost of service tariff. Such absurdities merit no discussion. Likewise the due process claim is unsupportable. PGT, as well as the several intervenors, were afforded a full and complete opportunity to be heard and present evidence before the Administrative Law Judge. Indeed, PGT participated in the hearing and not only presented evidence but was fully heard. Under Section 19(a) of the Act, 15 U.S.C. § 717r(a), PGT could have applied for a rehearing, but it failed to do so.

The Order of the Commission is therefore

Affirmed.

BAZELON, C.J., *dissenting:* There is a certain attractiveness, I must admit, to the FPC's decision in this case; after all, the Commission simply has required petitioner PGT to do what most other gas companies must do before

increasing their rates: give the FPC thirty days notice of the proposed increase so that the Commission can perform its statutory mandate to assure that the rates are "just and reasonable." But an appealing decision is not a *reasoned* decision, one which explains the basis for reaching the two necessary legal conclusions to support amendment of a tariff: (1) an existing condition has become "unjust, unreasonable, unduly discriminatory or preferential"; and (2) the remedy is just and reasonable.[1] While the Commission may have developed a reasoned justification for modifying PGT's essentially carte blanche import authority, I find no reasoned explanation for modifying PGT's cost-of-service tariff.

The crucial fact here is that the Commission once found it reasonable for PGT to pass through costs incurred in acquiring Canadian gas without seeking prior FPC approval. Indeed, the Commission freely admits that the tariff has operated reasonably. The Commission argues, however, that now that Canadian prices are no longer stable or fixed on the basis of production costs, the Commission must be able "promptly to decide in advance the measures, if any, to be taken with respect to increases in the price of Canadian gas imposed or compelled by Canadian authorities." Accordingly, the Commission found the pass through provision in PGT's tariff no longer reasonable.

The fatal flaw in this reasoning is that it falsely assumes the tariff somehow disabled the Commission from responding to Canadian imposed price increases. In truth, the only measure the tariff precluded the FPC from taking was that the FPC could not temporarily or permanently prohibit PGT from recovering costs incurred because of the increases. The Commission has failed to explain why imposing a prohibition on cost recovery ever would be an appropriate or even plausible response to Canadian price increases. After all, PGT, not the Canadian government or Canadian producers, would bear the brunt of such a prohibition; the FPC concedes that had PGT been required to absorb even the initial 32 cent price increase for a short period of time it would have been driven out of business, and 2,000,000 consumers would have been deprived of 40% of their gas supply. Yet PGT plainly has no responsibility for or control over price increases mandated by the national Canadian government. PGT cannot even mitigate the impact of those increases by expanding production of non-Canadian gas since PGT's sole operations are in Canada. Thus, the Commission could not possibly question the reasonableness of PGT recovering costs imposed upon it by the Canadian government. This would be true even if those costs were unreasonable —a question the Commission expressly declined to consider. The Commission's actions in promptly approving all the increases PGT has requested since its tariff was modified strongly support this conclusion.

The real measure the Commission wishes to be able to consider with respect to Canadian price increases, as its opinion makes clear, is a halt in the further importation of Canadian gas.[2] But that measure can be taken, if at all, only in a proceeding under section 3 of the Natural Gas

1. American Smelting & Refining Co. v. FPC, 494 F.2d 925, 940-41 (D.C.Cir.), *cert. denied, sub nom.* Southern California Gas Co. v. FPC, 419 U.S. 882 (1974); *see* Public Service Comm'n v. FPC, 511 F.2d 338, 344-46 (D.C.Cir. 1975).

2. The Commission's opinion also makes clear that the Commission sought to protect its ability to "send a message" to Ottawa concerning price increases. Putting aside questions as to the propriety of this objective in an adjudicative proceeding, the Commission failed to explain how penalizing PGT by requiring it to absorb Canadian imposed costs would be an effective method of communication. Indeed from this vantage point as well, it seems that an importation review proceeding would be far more effective in achieving the FPC's objective.

Act, 15 U.S.C. § 717b, which provides for issuance and amendment of authorizations to import foreign gas. If the Commission desired to assure itself an opportunity to consider halting imports in light of each price increase, it should have proceeded under section 3 to amend PGT's import authorization to require further review and a new authorization for each future price increase before PGT could import gas at the higher price. This is precisely what the Commission did in *Midwestern Gas Transmission Co.*, a decision on which the Commission purported to rely here.[3] Instead, the Commission acted under section 5, 15 U.S.C. § 717d(a), to amend the tariff so as to require review under section 4, 15 U.S.C. § 717c, before PGT can recover costs incurred in acquiring gas PGT was authorized—indeed obligated—to acquire. Finding that the Commission has failed to justify this peculiar action,[4] I respectfully dissent.

3. Docket No. G-18314, Order of March 29, 1974. Even this action would have been justified only if the need for Canadian gas was not such that the United States would have to import it regardless of price. The Administrative Law Judge made this same point with regard to the tariff modification he considered, but then upheld the modification without any information as to the need for Canadian gas, leaving that question for "due consideration by the Commission." This action—and the FPC's subsequent action in adopting the ALJ's opinion without even commenting on this crucial issue—seems to ignore our teaching that in a section 5 proceeding, the burden of proof is on the party advocating a modification, here the Commission staff. *See* American Louisiana Pipe Line Co. v. FPC, 344 F.2d 525, 529 & n.4 (D.C.Cir. 1965).

4. The remedy imposed by the Commission is unreasonable for an independent reason as well: it increases the risks to which PGT is exposed without increasing its rate of return. PGT is thus saddled with a "hybrid" tariff reflecting the worst of both worlds: the risks of suspension and refund associated with a normal tariff yet the low rate of return associated with a cost-of-service tariff. It is no answer to say that this situation can be corrected in a section 4 proceeding; even if that is true—even if PGT can propose more than a pass through of Canadian prices under the Commission's decision—it does not excuse the FPC's failure to provide a reasonable remedy in the instant proceeding. *Cf.* Trunkline Gas Co. v. FPC, 247 F.2d 159 (5th Cir. 1957).

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1975

No. 74-2046
Pacific Gas Transmission Company, Petitioner

v.

Federal Power Commission, Respondent
Pacific Gas and Electric Company,
Bank of America National Trust and Savings Assoc.
Southern California Gas Company, Intervenors

Before: BAZELON, Chief Judge, CLARK,* Associate Justice of the Supreme Court of the United States and MacKINNON, Circuit Judge

ORDER

It is ORDERED by the Court that the opinion of April 9, 1976 in the above entitled case is hereby amended as follows:

Page 9 of the majority opinion, first full paragraph, delete the last sentence which reads

> Under Section 19(a) of the Act, 15 U.S.C. § 717r(a), PGT could have applied for a rehearing, but it failed to do so.

United States Court of Appeals
for the District of Columbia Circuit
Filed May 28 1976

Per Curiam
For the Court
/s/ GEORGE A. FISHER
Clerk

GEORGE A. FISHER
Clerk

*sitting by designation pursuant to 28 U.S.C. § 294(a)

Appendix B

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1976

No. 74-2046
Pacific Gas Transmission Company, Petitioner

v.

Federal Power Commission, Respondent
Pacific Gas and Electrtic Co.
Bank of America National Trust and Savings Assoc.
Southern California Gas Co., Intervenors
Before: Bazelon, Chief Judge; Tom Clark, Associate Justice of the Supreme Court of the United States and MacKinnon, Circuit Judge.

ORDER

Upon consideration of the joint motion of petitioner Pacific Gas Transmission Company and of intervenor Pacific Gas and Electric Company to enlarge the time for filing a petition for rehearing, time having expired, of respondent Federal Power Commission's opposition, of the reply of petitioner Pacific Gas Transmission Company thereto, and upon consideration of the joint petition of the aforementioned petitioner and intervenor for rehearing which had been lodged in the Clerk's Office, it is

ORDERED, by the Court, that the joint motion of petitioner Pacific Gas Transmission Company and of intervenor Pacific Gas and Electric Company to enlarge the time for filing a petition for rehearing is granted, and the Clerk is directed to file movants' lodged joint petition for rehearing, and it is

FURTHER ORDERED, by the Court, that the joint petition of Pacific Gas Transmission Company and of Pacific Gas and Electric Company for rehearing is denied.

Per Curiam
For the Court:

/s/ GEORGE A. FISHER
Clerk

United States Court of Appeals
for the District of Columbia Circuit
Filed Jun 2 1976
GEORGE A. FISHER
Clerk

Chief Judge Bazelon would grant the joint petition for rehearing.
•Sitting by designation pursuant to Title 28 U.S. Code Section 294(a).

Appendix C

United States of America
Federal Power Commission

Pacific Gas Transmission Company) Docket No. RP73-111

INITIAL DECISION ORDERING MODIFICATION OF COST OF SERVICE TARIFF

(July 1, 1974)

APPEARANCES

Sanford M. Skaggs and *Peter W. Hanschen* for Pacific Gas Transmission Company
E. R. Island for Southern California Gas Company
Raymond N. Shibley, Robert E. Fabian, and *Patrick A. Murphy* for Bank of America National Trust and Savings Association
Frederick T. Searls and *Daniel E. Gibson* for Pacific Gas and Electric Company
Mark G. Magnuson for the Federal Power Commission

CONVISSER, Presiding Administrative Law Judge: This proceeding involves a difficult question posed by Staff's proposal to revise Section 3.1(1) of Rate Schedule PL-1 Pipeline Service of Pacific Gas Transmission Company (PGT).

THE PROCEEDINGS

The proceedings had its inception in a letter from PGT, filed with the Commission May 17, 1973, enclosing an amendment to its gas purchase contract with Alberta and Southern Gas Co., Ltd. (A&S), its Canadian supplier (*Tr. 138*). The amendment was to take effect July 1, 1973. It provided for an increase of one cent per Mcf in the charge by A&S to PGT to provide an exploration and development fund.[1]

1. Since, as shown below, this amendment never became effective, its terms are not discussed further

On June 29, 1973, the Commission, by letter order, rejected the filing, without prejudices as not covered by PGT's importation authority.

PGT filed a petition for reconsideration of this letter order on July 30, 1973. The Commission issued an order on September 13, 1973, granting the motion and, on reconsideration, vacating its letter order and instituting an investigation, under Section 5(a) of the Natural Gas Act, to determine whether PGT's cost of service tariff should be modified to limit or redefine the costs which may be reflected in PGT's rates as purchased gas costs. The order also granted intervention to California and its Public Utilities Commission in response to their notice filed on June 25, 1973. Intervention was also granted later to California Gas Producers Association and Pacific Gas and Electric Company (PG&E).[1]

The amendment to the PGT gas purchase contract never became effective and ultimately was cancelled. It was to be included in PGT's charges and had expressly been made subject to authorization by the California Commission to PG&E, the sole purchaser of PGT's gas, to reflect the increase in PG&E's rates. PG&E made an application to the California Commission and later withdrew it (*Tr. 168*). Thus, the precondition of the amendment to the PGT gas purchase contract was not fulfilled.

1. Petitions to intervene were filed by Bank of America National Trust and Savings Association (Bank America) and Southern California Gas Company. The Commission has not granted these petitions, nor has it expressly denied them. Nevertheless, I permitted them, subject to Commission action on their petitions, to appear at the evidentiary hearing in which Bank America submitted a witness and participated in cross examination of the Staff witness. Later they both filed briefs and I permitted Bank America to participate in oral argument as an *amicus*. By order, issued June 25, 1974, the Commission permitted both to intervene.

Meanwhile, however, a circumstance of far graver significance and consequence became known: the border price paid by PGT for Canadian gas (the totality of its gas purchases) was to increase from 38¢ to 70¢ on or about July 1, 1974. This is probably to be followed by other increases after July 1, 1975. Tr. 175, Ex. 6, p.2.

Consequently, this proceeding went forward.

An evidentiary hearing was held and concluded on April 30, 1974. At the hearing PGT moved to dismiss the proceeding. I reserved decision. Staff orally moved at the hearing that the intermediate decision procedure be waived. The Commission denied the motion but, recognizing the need for prompt resolution of the issue presented here, set July 1, 1974, as the date on or before which the intermediate decision is to be issued. Briefs were filed and, on June 6, 1974, oral argument was made.

BACKGROUND

PG&E is a large distributor of natural gas and a generator and distributor of electric power. It sells gas exclusively within the State of California. It makes no interstate sales and performs no interstate transmission of gas. It is subject to the jurisdiction of the California Commission.

PG&E found it necessary to search for new major sources of supply of natural gas to meet increasing demand. The search led to Alberta, Canada, and in 1957 agreements were reached with a number of Alberta producers for the sale to PG&E or its affiliates of substantial volumes of natural gas. During the same year PG&E established PGT, in which it owns over 50 percent of the stock, to import Canadian gas, receive it at the border and transport it by PGT pipeline to the California border.

Other companies, mainly PG&E affiliates, are involved in the sale and transmission of natural gas ultimately to

PG&E. A&S is a wholly owned subsidiary of PG&E and is incorporated under the Companies Act of Alberta. A&S purchases natural gas from Canadian producers for sale to PGT. This gas is transported to a point near the Alberta-British Columbia border by the Alberta Gas Trunk Line Company, Limited (Alberta Trunk Line), a Canadian company having no connection with PG&E or its affiliates, except that A&S owns 15 shares of its Class B Group II common stock. The gas is received from Alberta Trunk Line by Alberta Natural Gas Company Ltd. (Alberta Natural), a Canadian company, and delivered to PGT at the United States border. As of March 15, 1974, PGT owned 45 percent of the common stock of Alberta Natural.

PGT applied to FPC for the requisite pipeline certificate, import license and Presidential Permit for import facilities and received them on August 5, 1960. See Dockets Nos. G-17350, G-17351 and G-17352. PG&E obtained a certificate from the California Commission and the required Canadian authorizations were obtained by the appropriate parties. The Canadian gas began to flow into the PGT system and thence to PG&E in December 1961.

The volume of natural gas received by PG&E via PGT has grown from 415,000 Mcf daily to 1,023,000 Mcf daily. This constitutes 38 percent of PG&E's total gas purchases. It also constituted, in 1972, approximately one-third of the total gas imports from Canada by all United States pipeline companies. It was estimated that, in the third year of importation, the border price of Canadian natural gas to PGT would be something less than 28¢ per Mcf. See Presiding Examiner Weston's decision on *Applications for Certificates,* 24 FPC 144, 164, affirmed in major part, *Pacific Gas Transmission Company,* 24 FPC 134 (1960). The current price is about 38¢ per Mcf and, as already noted, is

expected to go to about 70¢ per Mcf on July 1, this year (Tr. 175, 194).

PGT operates on the basis of a cost of service tariff (as does A&S), under which it bills PG&E, its sole purchaser, monthly for its operating expenses, depreciation, amortization, taxes and return. No prior review by the Commission is required; the formula, including the rate of return, has already been fixed by the Commission. The bills generally fluctuate from month to month (Tr. 141). Purchased gas costs are included in operating expenses; as a result, the cost of service tariff permits the monthly charge to reflect changes in gas costs without prior Commission approval.

During the proceedings leading to the certification of the PGT project and the authorization of the cost of service tariff, concern was expressed that Canadian prices might become excessively high. Presiding Examiner Weston, after discussing the price problem at some length in his initial decision, 24 FPC 144, 158-167, said, at 168:

> In the event that the annual reports signal the existence or possibility of excessive costs or prices in the Canadian components of the project, further action may be taken by the Commission, the local authorities in the territories to be served, or jointly by both, to induce representation, through appropriate channels to the appropriate Canadian authorities, on behalf of American consumers. On the other hand, if Canadian prices do not exceed amounts considered just and reasonable, according to American standards, as is anticipated by the project sponsors, no further action will need to be taken during the life of the project except the receipt and dissemination of the annual reports as prescribed.

He said further, at 171:

> It is believed that the conditions imposed in the Findings and Order to follow, providing for publicity and accounting controls looking towards possible further governmental action in accord with the "good neighbor" policy, will be welcomed by American and Canadian utility interests who accept the principle that public service is keyed to cost and reasonable return, and not to the value of gas service to willing buyers.

He then included in his order a requirement that PGT file reports concerning itself, PG&E and their Canadian affiliates. His order also contained provisions with respect to the rates of return of, and prices paid for gas by, all these companies. Pp. 171-172.

The Commission found some of the Examiner's precautionary requirements inappropriate, but, on the one hand, it recognized the validity of his concern and, on the other, expressed some reassurance, stating at 24 FPC 136-137:

> The chief concern expressed by the examiner in his recommendations is that future changes in the Canadian costs of service may not be adequately regulated by the Canadian authorities. The most important of these costs is the cost of purchased gas reflecting Canadian producer prices. In this connection it is worth noting that Alberta & Southern has entered into option agreements with several major producers covering areas containing both established and prospective reserves of great size. These agreements commit the producers to sell large additional volumes of gas at the same prices as those in the present contracts, when and as needed for the contemplated future expansion of this project. These reserve acreage contracts should have an important stabilizing effect on field prices in the foreseeable future. Furthermore, substantial volumes of the gas purchased by Alberta and Southern and by Westcoast and transported by Trunk Line will be delivered to local distributors in Alberta, thus

creating a strong local interest in stable field prices. Finally, any increases in Canadian prices will receive the closest scrutiny whenever the applications for the contemplated expansion of this project are filed with the Commission.

In the present case the Commission's order of September 13, 1973, was prompted by PGT's filing of the amendment to its gas purchase contract with A&S. which amendment, as already noted, never became effective. Nevertheless, the Commission's concern, expressed in its order launching the instant investigation, cannot reasonably be deemed to have abated in the face of the prospective doubling of the border price of Canadian gas.

The Commission's order of September 13, 1973, instituted this proceeding "to determine whether PGT's cost of service tariff should be modified to limit or redefine the costs which may be reflected as purchased gas costs in PGT's rates."

THE MOTION TO DISMISS

Before discussing the substantive question, it is necessary to deal with the motion to dismiss, made in writing by PGT and argued at the hearing on April 30, 1974. The argument in support of the motion is that, in this type of proceeding, Staff has the burden of proving, in the terms of Section 5(a) of the Natural Gas Act (15 U.S.C. 717d(a)), that the tariff is "unjust, unreasonable, unduly discriminatory, or preferential," and that Staff's evidence is speculative and thus falls short of meeting its burden. Staff's burden, according to PGT is to establish by substantial evidence the respects in which PGT's cost of service tariff or its operation has the defects specified in Section 5(a). This argument really fails to come to grips with the essential point. Staff makes no claim that the tariff has operated or been used in an unsatisfactory manner in the past. Indeed, it was stipulated on the record that the "tariff is just, reasonable and lawful, and the operation of the tariff has been just, reasonable and lawful with the sole exception that the Staff is contending that the absence of opportunity for the Commission to have prior review of increases in purchased gas costs; that is considered unreasonable." Tr. 49. It was conceded, however, both that a change in circumstances may make a once reasonable tariff unreasonable and that the Commission has power to require revision of the tariff (Tr. 31-33).

Thus, the motion asserts that the certainty of an impending increase in purchased gas cost of the proportions of the one here involved and the uncertainty of other considerations are insufficient, as a matter of law, to support a finding that the once-reasonable provision of the tariff, permitting the Commission to be by passed, is no longer reasonable. As shown below, the other considerations, in my view, are not uncertain.

This issue should not be confused with the somewhat different question of whether and the extent to which the ultimate decision in this case should be affected by the claim that a change in the tariff of the kind proposed by Staff will seriously damage PGT. That question will be dealt with below.

To return to the reasonableness issue, it may be helpful to postulate a somewhat different issue, *i.e.*, a proposal for a tariff for a planned new project for the purchase and sale of natural gas, the price of which is increasing in very large increments. In this situation, it could hardly be argued seriously that it would be arbitrary or otherwise contrary to law to hold that the public interest and the Commission's

statutory duties make it appropriate for it to require that an applicant's proposed price increases be submitted to it for prior approval. Indeed, absent compelling circumstances, it would be an abdication of the Commission's functions for it to approve a *carte blanche* tariff in the face of impending massive price increases. The existence of a cost of service tariff, as in PGT's case, does not lessen the requirements of the public interest.

For the purpose of this discussion, the differences between Sections 4 and 7 of the Natural Gas Act that would be applicable in the hypothetical case and Section 5, under which the present investigation is being conducted, are not significant. The standards of "just and reasonable" of Sections 4 and 5, and "public convenience and necessity" of Section 7 alike authorize retention or retrieval, as the case may be, by the Commission of the power to approve or disapprove in advance price increases of the magnitude of those with which we are here concerned. It is, of course, true that the existence of a cost of service tariff in the present case raises problems absent from the postulation. But these are dealt with below.

In addition to the factor of the size of the price increase, there has been a change of considerable significance and unquestionable certainty in the ground rules. When the PGT tariff was certificated the Commission noted that agreements between A&S and major producers "commit the producers to sell large additional volumes of gas at the same prices as those in the present contracts . . . [and] should have an important stabilizing effect on field prices in the foreseeable future." 24 FPC at 137. This was the Commission's reassurance as to the examiner's concern "that future changes in the Canadian costs of service may not be adequately regulated by the Canadian authorities." 24 FPC at 136-137.

As we now know, however, Canadian regulation is forcing gas prices higher in giant steps. The Federal Power Commission's hope for stability in Canadian gas prices is disappointed; its reliance was plainly misplaced.

The record, in my opinion, thus supports the conclusion that this heretofore reasonable tariff, which operated reasonably in the past, has become unreasonable in that it permits price increases, however massive and however unrelated to cost, to be reflected in the cost of service without prior Commission approval. Obviously, therefore, there has been no failure of proof. The motion to dismiss, accordingly, is denied.

THE ULTIMATE QUESTION

Denial of the motion to dismiss still leaves open the issue whether the PGT tariff should be revised. There is still the matter of the impact of a tariff change on PGT and the question whether, in consideration thereof, the Commission should exercise its authority to make the change, and if so, how. For the requirement of prior Commission approval for changes in PGT's rates is fraught with the risk of serious prejudice to PGT and others.

Consideration, therefore, should now be given to whether efforts can and will be made by the Commission and others to cause the Canadian authorities to reduce the border price of Canadian gas and, if not, whether there is any likelihood that it will be found to be contrary to the public interest to permit the importation of this gas at 70¢ per Mcf or to authorize PGT to reflect all or part of the increase in its charges. For, if it is now known that nothing can be done about the 70¢ price (or even higher prices that appear to be in the offing) and if it is now reasonably certain that the need for the gas in the United States is too great to permit its exclusion, regardless of price, modification of

the tariff will contribute little, if anything, to the public interest but will likely cause severe injury to PGT and some of its affiliates.

Here, it is important to note that there is nothing in the record that sheds any light on the first point, nor is there any information with respect thereto that I can or may officially notice. I may add the irrelevant observation that I have no personal knowledge on this score. As to the second point, on the other hand, if approaches to the Canadian authorities are ongoing or planned, an indication now that the United States can not or will not do anything but allow the importation of the gas at the price indicated might very well impede the American effort. These are matters that cannot be given weight in my decision, but they should, and no doubt will, be given due consideration by the Commission.

As counterpoise to these considerations, the record clearly shows the possible detriment to PGT.

The cost of service tariff enables it to bill for and promptly collect its increased costs, including increases in its purchased gas costs, which are by far the largest element in its total costs. The benefits of this tariff, as compared with one in which a change in the rate must receive advance Commission approval, are the adequacy of a lower rate of return than might otherwise be called for, the avoidance of administrative lag and financial detriment consequent on applications for rate changes, higher ratings for bonds and lower interest rates thereon and, finally, lower rates.

The unchallenged testimony shows the reasonably anticipated results of requiring PGT to obtain prior Commission approval for rate changes:

1. PGT would need more cash than at present to tide it over the periods of administrative lag.

2. Lower bond ratings and higher interest costs for PGT.

3. Higher prices to be charged by PGT and PG&E.

4. The risk of financial loss even to the point of bankruptcy. With purchases of over one million Mcf per day, the 32¢ increase in the price of Canadian gas would increase its costs by more than $300,000 per day. PGT is not a large company. Its earnings in 1973 were $6,300,000 and its depreciation funds available for reinvestment were $2,000,000. It could not absorb an unrecompensed cost of $300,000 per day for more than a very short period and still remain solvent. Even if it were promptly allowed to increase its rate, subject to refund, the overhanging contingent refund liability would seriously damage its credit; and if the increase were ultimately disallowed in whole or part, the resultant liability might undermine or even destroy its solvency.

On the other side of the ledger, it is appropriate to note that PGT's credit could be supported by PG&E, its majority stockholder and sole gas purchaser. PG&E is a financial giant compared to PGT and could guarantee or perhaps even purchase the latter's bonds. Again, the higher rates resulting from the tariff change might be a justifiable cost of safeguarding the public interest.

The greatest difficulty would lie in protecting PGT's solvency. For this it would be necessary for the Commission to provide a special procedure for the prompt processing and determination of applications by PGT and others similarly situated for authority to make rate changes. For, if ordinary procedures, however expedited, are followed, it is hardly to be supposed that crippling and perhaps even fatal delays will always be avoided.

Weighing these considerations, I have concluded that PGT's interests, safeguarded to the extent possible, must give way to the public interest, which requires modification of PGT's tariff to provide that certain increases in gas costs may not be charged by PGT without the Commission's prior approval.

As already stated, PGT's cost of service tariff was reasonable when authorized and has operated reasonably since. When this tariff was authorized in 1960 it was with the expectation that the prices of Canadian gas would be relatively stable, that increases would be moderate and that these would be cost based. This situation has changed radically. Increases are not wholly or even preponderantly cost based, and it has been indicated that these increases are to apply to exported gas; relief measures are planned for Canadian consumers. Ex. 7, p. 3. Having become geared to United States gas prices, the Canadian prices are now being geared to United States prices for competing fuels (Tr. 153-154). The expected increase of 32¢ per Mcf is not moderate. I do not discuss its reasonableness since the spirit of "gather ye rosebuds while ye may" is not confined to Canada.

This is a situation with which the Commission must be free to deal. PGT's present tariff seriously restricts such freedom and therefore must be modified, with, I hope, appropriate provision for the prevention of unnecessary or undue detriment to PGT.

THE TEXT OF THE REVISION

Staff proposed a revision of the PGT tariff consisting of the addition of the following sentence to Section 3.1(1) of its Rate Schedule PL-1, dealing with operating expenses, including purchased gas costs:

> Any change in the rate for gas purchased from Canadian suppliers must receive prior approval from the Federal Power Commission before said change can be reflected in Seller's Cost of Service Charges.

This provision is thoroughly unworkable, concededly so (Tr. 81, 88). PGT buys its gas from A&S, which, like PGT has a cost of service tariff. The A&S price is billed monthly and is the sum of various costs incurred, including purchased gas costs. It varies from month to month, depending on volumes, the number of days in the month, the field from which gas is drawn, etc. (Tr. 69, 87).

Staff's proposed modification would bar PGT from reflecting in its own price a downward fluctuation in the A&S price unless it received Commission approval. Would PGT be justified in construing the proposed revision as giving it the choice of applying or not applying for Commission approval; and, if so, would it not also be justified in concluding that an application with respect to a small decrease would not be worth the time, effort and expense? On the other hand, PGT would have to come to the Commission repeatedly for price increases (a change in its cost of one cent per Mcf would come to over $10,000 per day) even in a case where an increase brought the price no higher than one approved by the Commission for a past month (when it had been followed by an intervening month for which a lower price had been charged).

Although the Staff witness attempted to reassure the parties that only certain types of "significant" changes would require Commission approval, his assurances were totally unsatisfactory and, moreover, were not supported by the language of his proposal. See, *e.g.*, Tr. 53-88.

I asked the parties to propose substitute provisions. Tr. 202. Staff failed to do so. PGT submitted a substitute,

in the consideration of which it bears repeating that, although the proposed amendment to PGT's gas purchase contract that triggered this proceeding has been withdrawn, we may reasonably surmise that the Commission's concern, expressed in its order of September 13, 1973, is certainly no less intense in the face of the prospective increase of 32¢ per Mcf. This surmise is strengthened by the Commission's action in *Midwestern Gas Transmission Company,* Docket No. G-18314. There the Canadian Natural Energy Board had amended the export license of Midwestern's Canadian gas supplier to provide that the export price be not less than 105% of the price to Canadian customers. Authorizing Midwestern to import the gas at the increased price, the Commission nevertheless said in its order issued March 29, 1974 (Mimeo p. 5):

> We are unwilling, however, to authorize the importation for the remaining terms of these contracts at 105% of whatever price level may be fixed for Canadian consumers. Possible price increases may be such that it would no longer be in the public interest that the importation should continue. Accordingly, our order will provide that in the case of any price increase above the April 1, 1974, level, Petitioners must apply to this Commission for further amendment of their import authorizations. The Commission pursuant to Section 3 of the Natural Gas Act will issue such additional orders as it may find necessary and appropriate to determine whether the proposed import at a new price or other unilaterally imposed conditions will be consistent with the public interest.

PGT's proposed revision plainly fails to meet the Commission's unwillingness to give sight-unseen approval

either to importation on "unilaterally imposed conditions" or, obviously, to the pass through of the resultant price increases to American consumers. PGT proposes the addition of the following sentence at the end of paragraph 3. 1(1) of its Rate Schedule PL-1:

> Provided, however, that the cost of purchased gas from Canada shall be determined as provided in the terms and conditions of the contract between Seller and its Canadian supplier in effect as of June 30, 1973, except as may otherwise be required by orders, rules, or regulations of governmental authorities in Canada.

This language would require prior Commission approval of the pass-through of price increases mutually agreed upon by PGT and its supplier, but would leave PGT's tariff in *status quo* with respect to costs reflecting an increase in Canadian gas prices required by Canadian authorities. Yet the latter is the very thing the Commission has said involves a serious question, *i.e.,* whether further importation would be in the public interest.

What is needed is a provision that will enable the Commission promptly to decide in advance the measures, if any, to be taken with respect to increases in the price of Canadian gas imposed or compelled by Canadian authorities. As already indicated, it is highly desirable that the provision entail as little detriment as possible to PGT. The revision I would make in PGT's tariff would, *inter alia,* require minimal applications by PGT to the Commission. For example, I see no need to require PGT to seek authorization from the Commission to reflect in its charges a reduction in the price of Canadian gas, if there should be any. I would revise PGT's tariff by adding the following language to paragraph 3. 1(1):

> Provided that prior approval must be obtained from the Federal Power Commission to reflect in Seller's cost of service charges any increase in its cost of gas purchased from its Canadian supplier either that is imposed or required by Canadian authorities or that reflects a price for purchased gas higher than the price theretofore reflected in the Canadian supplier's price.

This provision would cover increases in A&S' purchased gas costs, whether or not required by Canadian authorities; it would also cover all increased charges by A&S required by Canadian authorities. It would not apply to other increases in the costs of either A&S or PGT. Of course, it also would not apply to the 32¢ increase in the price of Canadian gas expected to go into effect on July 1, 1974, since there is no likelihood of final Federal Power Commission action with respect to this decision prior to that date. An appropriate modification of the tariff may be required, depending on what action, if any, the Commission will take with respect to that increase.

FINDINGS AND CONCLUSION

1. PGT's cost of service tariff was heretofore reasonable and reasonably operated.
2. By requirement of the Canadian authorities the fair value of Canadian gas for export must be judged by the price of competitive fuels and, as a result, the border price of Canadian gas purchased by PGT will be increased by 32¢ per Mcf on July 1, 1974. The price to the Canadian consumer, however, will likely be lower than the price for export.
3. The present competitive-fuel criterion for determining the fair value of Canadian gas for export was not used by the Canadian authorities at the time when the Federal

Power Commission issued a certificate of public convenience and necessity authorizing the PGT tariff. The adoption of this criterion by the Canadian authorities and the impending massive price increase, with others to follow on or after July 1, 1975, constitute a change of circumstance, which, in light of the newly developed situations makes the tariff unreasonable insofar as it deprives the Commission of authority to decide in advance whether PGT should be permitted to reflect certain types of increased costs in its charges.

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal or on its own motion, as provided in the Commission's Rules of Practice and Procedure, that:

1. PGT's tariff be amended by adding, at the end of paragraph 3. 1(1) of Rate Schedule PL-1, the following sentence:

> Provided that prior approval must be obtained from the Federal Power Commission to reflect in Seller's cost of service charges any increase in its cost of gas purchased from its Canadian supplier either that is imposed or required by Canadian authorities or that reflects a price for purchased gas higher than the price theretofore reflected in the Canadian supplier's price.

2. PGT's motion to dismiss this proceeding is denied.

/s/ Israel Convisser
Israel Convisser
Presiding Administrative Law Judge

Appendix D

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

Pacific Gas Transmission Company) Docket No. RP73-111

ORDER ADOPTING INITIAL DECISION
AND DENYING MOTION FOR ORAL ARGUMENT

(Issued September 3, 1974)

Pacific Gas Transmission Company (PGT) imports gas from Canada and transports it to American customers, principally Pacific Gas and Electric Company (PG&E) in California. PGT's rates are fixed by a cost of service tariff. Faced with a 1¢ price raise from its Canadian supplier, PGT on May 17, 1973, filed with this Commission an amendment to PGT's contract with supplier reflecting the increase. The Commission rejected the filing June 29, 1973, by letter order. On motion for reconsideration, the Commission on September 13, 1973, vacated its letter order and instituted a Section 5(a) proceeding to determine whether PGT's cost of service tariff should be modified to limit or redefine the costs which may be reflected as purchased gas costs in PGT's rates.

On March 5, 1974, the Commission ruled that testimony offered by Staff was within the scope of the Section 5(a) proceeding. That testimony suggested that "Any change in the rate for gas purchased from Canadian suppliers must receive prior approval from the Federal Power Commission before said change can be reflected in Seller's Cost of Service Charge." (Tr. 298).

The initial decision of Adminstrative Law Judge Israel Convisser, issued July 1, 1974, ordered that PGT's tariff be amended to provide:

> "Provided that prior approval must be obtained from the Federal Power Commission to reflect in Seller's cost of service charges any increase in its cost of gas purchased from its Canadian supplier either that is imposed or required by Canadian authorities or that reflects a price for purchased gas higher than the price theretofore reflected in the Canadian supplier's price."

The initial decision also denied PGT's motion to dismiss the proceeding.

Exceptions to the initial decision were filed July 16, 1973, by PGT, PG&E and Southern California Gas Company, and on July 17, by the Bank of America National Trust and Savings Association. On July 25, the Commission Staff filed a brief opposing exceptions. PGT included with its exception a motion for oral argument and on July 26, 1974, PG&E also moved for oral argument.

The exceptions were addressed generally to the financial effect that will result if PGT is not allowed to increase its rates to reflect the price increases in its gas purchased from Canada. It was also urged that the proper procedure would be to institute a Section 3 proceeding to amend PGT's import authorization to require clearance with the Commission of any increased price paid for gas to the Canadian supplier, rather than to permit the payment of potentially higher prices to the Canadian supplier and at the same time not allow this increased cost to be passed on in higher PGT rates without prior Commission approval.

After careful consideration, we find the exceptions to be without merit, and that the initial decision of Judge Convisser should be adopted as the opinion and order of the Commission.

The Commission orders:

(A) The initial decision issued July 1, 1974, in this proceeding is adopted as the opinion and order of the Commission.

(B) The motion of Pacific Gas Transmission Company to dismiss the proceeding, the exceptions to the initial decision, and the motions for oral argument are denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

Appendix E

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

Pacific Gas Transmission Company) Docket No. RP73-111

ORDER MODIFYING PRIOR ORDER AND OTHERWISE DENYING APPLICATIONS FOR REHEARING

(Issued November 1, 1974)

On October 3, 1974, applications for rehearing of the Commission order of September 3, 1974, were filed by Pacific Gas Transmission Company (PGT), Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SoCal) and Bank of America National Trust and Savings Association (Bank Am). On October 11, 1974, Interstate Natural Gas Association of America (INGAA) moved for leave to file a brief *amicus curiae,* with attached brief in support of the PGT application for rehearing. The Commission order adopted the initial decision of Administrative Law Judge Israel Convisser dated July 1, 1974, which directed PGT to revise its present cost-of-service tariff to preclude any recovery of increase in the cost of gas purchased from its Canadian supplier unless prior approval is obtained from the Commission.

The applications for rehearing generally reiterate the arguments previously presented to the Commission with respect to the effect of the Commission order on finances of PGT, its creditors and other utilities. These arguments

were previously considered, and we find nothing in them that would require modification of the prior order. The same is true with respect to the arguments as to procedure, with one exception. Bank Am, in its application for rehearing, advances a contention not made in the exceptions to the initial decision. It argues that the advance approval required of any increase in PGT's rates to reflect future increases in the price of gas to PGT from its Canadian supplier is contrary to Section 4 of the Natural Gas Act, and that it would be preferable to allow PGT to file such increases pursuant to Section 4, so they may be put into effect (after a minimum suspension period) subject to Commission approval and possible refund. Such procedure will provide equally well for Commission review of potential rate increases, and the order of September 3, 1974, will be modified to specify such procedure.

The Commission finds:

The applications for rehearing filed in this proceeding present no facts or legal arguments which would require any change in or modification of our prior order issued September 3, 1974, in this proceeding, except as provided below.

The Commission orders:

(A) Ordering paragraph 1. of the initial decision herein, adopted as the opinion and order of the Commission by Commission order issued September 3, 1974, is modified to read as follows:

> "PGT's tariff be amended by adding, at the end of paragraph 3.1(1) of Rate Schedule PL-1, the following sentence: Provided that prior filings must be made with the Federal Power Commission pursuant to Section 4 of the Natural Gas Act before there is reflected in Seller's cost of gas purchased from its Canadian supplier either that is imposed or required by Canadian authorities or that reflects a price for purchased gas higher than the price theretofore reflected in the Canadian supplier's price; the increase in Seller's cost of service charges shall be subject to suspension by the Commission pursuant to said Section 4, and, if so suspended, shall thereafter be collected subject to refund as provided in said Section 4."

(B) Except as herein granted, the applications for rehearing are denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

Appendix F

Natural Gas Act § 3 (15 U.S.C. § 717b)

§ 717b. *Exportation or importation of natural gas*

After six months from June 21, 1938 no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

June 21, 1938, c. 556, § 3, 52 Stat. 822.

Appendix G

Natural Gas Act § 5 (15 U.S.C. § 717d)

Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. June 21, 1938, c. 556, § 5, 52 Stat. 823.

Appendix H

Natural Gas Act § 19 (15 U.S.C. § 717r)

Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by

filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such

order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947.